



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

RUSSELL COLEMAN
ATTORNEY GENERAL

1024 CAPITAL CENTER DRIVE
SUITE 200
FRANKFORT, KY 40601
(502) 696-5300

24-ORD-167

July 29, 2024

In re: Christopher Hunt/Kentucky Board of Cosmetology

Summary: The Kentucky Board of Cosmetology (“the Board”) violated the Open Records Act (“the Act”) when it did not respond to a request to inspect records within five business days. The Board did not violate the Act when it did not provide records that do not exist.

Open Records Decision

On May 6, 2024, Christopher Hunt (“Appellant”) submitted a request to the Board for “[a]ll communications sent or received by [a specific Board member] concerning any activities or issues before the [Board] from” February 1, 2024, to the date of the request. The Appellant specified that his request included “emails, voicemails, text messages, or any other form of communication, including the [Board member’s] personal cell phone and email accounts.” On May 16, the Board stated that some of the requested records “are not within the immediate custody and control of the Board” and that, pursuant to KRS 61.872(5), responsive records will be made available on or before May 31, 2024.¹ Subsequently, on May 30, the Board stated it was granting the Appellant’s request.² This appeal followed.

Under KRS 61.880(1), upon receiving a request for records under the Act, a public agency “shall determine within five (5) [business] days . . . after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the five (5) day period, of its decision.” The Board admits it did not respond to the Appellant’s request until May 16, eight business days

¹ The Appellant has not challenged the Board’s invocation of KRS 61.872(5).

² The Board also stated that some records could be withheld under various exemptions but that it was producing those records because they had either been drafted by or sent to the Appellant in his prior capacity as counsel for the Board.

after it received the request. Accordingly, the Board violated the Act when it failed to issue a timely response within five business days.

On appeal, the Appellant claims the Board failed to produce all records responsive to his request. Specifically, he alleges that records documenting phone calls made by the specific Board member were not produced. In response, the Board maintains that it has “produced all responsive records in [its] possession.” Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to present a *prima facie* case that the requested record does or should exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester makes a *prima facie* case that the records do or should exist, then the public agency “may also be called upon to prove that its search was adequate.” *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341).

To make a *prima facie* case that additional records exist, the Appellant provides an email and a voicemail that reference two phone calls made by the Board member concerning Board business. The Appellant further states that during his “employment as counsel for the Board, [he] was also made aware of at least two other instances where [the Board member] either attempted to contact, or did contact, Board employees.” A requester’s bare assertion that an agency must possess requested records is insufficient to establish a *prima facie* case that the agency actually possesses such records. *See, e.g.*, 24-ORD-062; 22-ORD-247; 22-ORD-040. Rather, to present a *prima facie* case that the agency possesses or should possess the requested records, the requester must point to a statute, regulation, or some other factual support for the contention. *See, e.g.*, 21-ORD-177; 11-ORD-074. Here, the Appellant has only produced evidence that on two occasions, the identified Board member made phone calls about Board business. The Appellant has not presented any statute or regulation requiring the Board to create a record documenting such calls, or some evidence to support the existence of any responsive records related to the phone calls within the Board’s possession.³ *See also* 24-ORD-134 (finding that the

³ The Appellant alternatively requests that the Office require the Board member to produce her personal cell phone and email to be inspected and analyzed by a “properly authorized forensic examiner” to determine if additional responsive records exist or whether such records were destroyed. However, the Attorney General is not a “finder of documents” and cannot resolve factual disputes between the parties about whether all responsive records have been provided. *See* 94-ORD-121. Moreover, the Act only allows the Attorney General to “request additional documentation from the agency for substantiation” or “request a copy of the records involved,” which “shall not be disclosed.” KRS 61.880(2)(c). The Act does not allow the Office to compel production of a private cell phone or personal email account for forensic analysis. Thus, the Office declines the Appellant’s request that it compel production of the Board member’s personal cell phone and email address for forensic analysis.

Appellant had not made a *prima facie* case that “phone call lists” existed when he presented evidence that a phone call had occurred). As a result, the Office cannot find that the Board violated the Act when it did not provide records it does not possess.⁴

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under KRS 61.880(3), the Attorney General shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceedings. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

Russell Coleman
Attorney General

/s/ Zachary M. Zimmerer
Zachary M. Zimmerer
Assistant Attorney General

#287

Distributed to:

Christopher Hunt
Jacob C. Walbourn
Kelly Childers
Julie M. Campbell

⁴ The Appellant relies on a recent, not yet final, decision by the Kentucky Court of Appeals for the proposition that the records he seeks are public records subject to the Act. *See Ky. Open Gov't Coalition, Inc. v. Ky. Dep't of Fish & Wildlife Res.*, No. 2022-CA-0170-MR, 2023 WL 7095744 (Ky. App. Oct. 27, 2023), *mot. for disc. rev. granted*, No. 2023-SC-0524-D (Ky.). Because the Supreme Court of Kentucky has granted the Department of Fish and Wildlife Resources' motion for discretionary review, the Court of Appeals' decision is not final or binding authority. RAP 40(H). Moreover, the Board has not claimed that any responsive records in its possession are not public records subject to the Act. Rather, it claims that no additional responsive records exist.